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No. 73-760

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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HENRY L. TOMOW, SR., ET AL.,

*Plaintiffs,*

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,

*Defendants.*

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF GEORGE W. KENOTE AND OTHERS

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# INDEX


PAGE

I. Statement of the Case ..... 1

II. Argument—The Appeal Sought Would Raise No Substantial Federal Questions ..... 3

A. The alleged failure to apply the "Rule of Liberal Construction" raises no serious Federal issue ..... 3

1. The rule of liberal construction which the Courts below did not follow was never cited below ..... 3

2. The rule of liberal construction is not applicable in any event ..... 4

3. Even if applicable, the rule of liberal construction would compel the same conclusion reached below ..... 6

(a) Individual Menominees never had any individual rights in Menominee lands ..... 6

(b) The Menominee Termination Act gave the Menominees the right to spell out the rules governing sales of land after termination with a Termination Plan ..... 7

(c) The Termination Plan vested the ultimate power to approve of land sales in the hands of the Voting Trust Trustees during the life of the Voting Trust ..... 8

B. The Menominee Termination Act Was Not Violated ..... 12

III. Conclusion ..... 13

Appendix—Abridgement of Testimony ..... App. 1-39

## AUTHORITIES CITED

### *Cases*

PAGE

Choate v. Trapp, 224 U.S. 665 (1912) ..... 3

U. S. v. Shoshone Tribe, 304 U.S. 111, 114 (1938) ..... 5

Winters v. United States, 207 U.S. 564, 576-77 (1908) 5

### *Other Authorities*

Rule 23-1(f) ..... 3

25 USC §893 ..... 7, 12

Wis. Stats. Sec. 180.27 ..... 13

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF GEORGE W. KENOTE AND OTHERS

### I. STATEMENT OF THE CASE

This is a suit brought to block sales of land around an artificial lake. The lake is located in Wisconsin on what used to be the Menominee Indian Reservation. It was developed by a partnership consisting of Menominee Enterprises, Inc. (hereinafter referred to as MEI) and N. E. Isaacson & Associates, Inc. (hereinafter referred to as NEI). Roughly half of the land around the lake had already been sold at the time this suit was begun and is not involved in the suit.

Plaintiffs are a group of Menominee Indians. The Defendant MEI is the Menominee Indian owned corporation formed when federal supervision over the Menominee Indian Tribe was terminated in 1961. It holds most of the tangible assets formerly owned by the tribe. The Defendant, NEI, is a Lake Developer and partner of MEI in the lake project. The individual Defendants (many of whom are represented by this brief) are persons who held leadership positions in MEI or the Menominee Common Stock & Voting Trust. The latter trust holds all of the stock of MEI. Most of the individual Defendants are also Menominee Indians.

The lake development was the outgrowth of a federally financed study that concluded economic development was necessary for the continued viability of MEI and Menominee County and was approved in 1968 by a substantial majority of Menominee people voting in an advisory referendum on the subject. (See the facts set forth in the opinion below, Pet. App. pp. 7-8.) Additional facts will be noted below.

## II. ARGUMENT—THE APPEAL SOUGHT WOULD RAISE NO SUBSTANTIAL FEDERAL QUESTIONS

### A. The Alleged Failure to Apply the "Rule of Liberal Construction" Raises No Serious Federal Issue.

#### 1. THE RULE OF LIBERAL CONSTRUCTION WHICH THE COURTS BELOW DID NOT FOLLOW WAS NEVER CITED BELOW.

The first reason advanced in the petition for a granting of a writ of certiorari is that the "Wisconsin Supreme Court erred by failing to apply the rule of liberal construction. . . ."

The petition notably fails to conform to rule 23-1(f) of this Court because, although the appeal is from a state court decision, the petition does not disclose where this issue was first raised or the portions of the record showing when this issue was first raised.

This deficiency is undoubtedly attributable to the fact that the Plaintiffs never argued the "rule" before. It was never mentioned to either the Trial Court or the Wisconsin Supreme Court. Only one of the cases cited to this Court in support of the "rule" was cited to the Wisconsin Supreme Court and that for an altogether different proposition.[1]

The Plaintiffs below agreed with the Defendants that the "parol evidence rule" was applicable. The only question there was whether the instruments being interpreted were

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[1] *Choate* v. *Trapp*, 224 U.S. 665 (1912) was cited on page 19 of the brief of the Plaintiffs to the Wisconsin Supreme Court for the undisputed principle that tribal lands are held by the tribe rather than by individuals.

ambiguous. (See the Wisconsin Supreme Court's opinion at Pet. App. p. 23 and the Trial Court's opinion at Pet. App. p. 47.) Plaintiffs' position before this Court would thus be diametrically opposite to the position they took below on this point on which they are seeking a reversal. Their position here, is therefore, clearly untenable.

## 2. THE RULE OF LIBERAL CONSTRUCTION IS NOT APPLICABLE IN ANY EVENT.

The "rule of liberal construction" as stated in Plaintiffs' Petition on page 19 is that "In . . . the Government's dealings with the Indians . . . doubtful expressions are to be resolved in favor of the Indians."

This rule is inapplicable first because the dispute here is not between "the Government" and "the Indians." It is essentially a dispute between Indians, some of whom are represented on this brief and vigorously dispute the contentions of the Plaintiffs. No governmental unit is even a party to the litigation.[2]

It should be noted that no treaty or agreement between the Government and the Indians is involved. Although Plaintiffs refer on numerous occasions to the 1854 Treaty of the Wolf River, they do not argue that this case turns on its interpretation. Nor was the Wisconsin Supreme Court asked to interpret that Treaty. The rights Plaintiffs assert here are based rather upon the Articles of In-

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[2] The State of Wisconsin in the companion case of *Daly, et al.* v. *Natural Resources Board* has been embroiled in litigation by the Plaintiffs but, insofar as this issue is concerned, only because it reasonably relied on MEI's record title to the land. NEI's involvement is also collateral in the sense that it became involved in the development only after it was invited to do so by the Indian leaders.

corporation of MEI, a Wisconsin business corporation, as set forth in the Menominee Termination Plan, described by the Trial Court as "basically the plan of the Menominee Indians." (Pet. App. p. 50.)

The "rule of liberal construction" is also inapplicable because, as the Wisconsin Supreme Court pointed out, the controlling instruments are not ambiguous. The existence of an ambiguity capable of resolution by reference to an established purpose is a touchstone of the rule as expressed in most of the cases, as the following statement of it in *Winters* v. *United States,* 207 U.S. 564, 576-77 (1908) illustrates:

> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two [permissible] inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

None of the cases suggest that it is the job of the Courts to completely rewrite all agreements made by Indians.[3]

The rule is inapplicable lastly because the instruments in question here are the work product of a different Indian than the one contemplated by the "rule of liberal construction." The latter, for example, was referred to in *U. S.* v. *Shoshone Tribe,* 304 U.S. 111, 114 (1938) as follows:

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[3] The Plaintiffs below did not argue that the trust should be "reformed." If they had, their claim would have been barred by estoppel and the Wisconsin Statutes of Limitation since their suit was not commenced until after the lake project was built and 11 years after the terms of the Trust were approved.

> "When the treaty of 1868 was made, the tribe consisted of full blood blanket Indians, unable to read, write, or speak English."

The Menominee of today are a literate people. *Their agreements are entitled to be treated under the law with no less respect than those between white men.* It would be an unjust disservice to them to substitute judicial speculation as to what they intended for unambiguous written instruments which they approved, followed, and relied upon for many years.

### 3. EVEN IF APPLICABLE, THE RULE OF LIBERAL CONSTRUCTION WOULD COMPEL THE SAME CONCLUSION REACHED BELOW.

The evidence admitted at the trial concerning the purpose of MEI's Articles of Incorporation and the terms of the Menominee Common Stock & Voting Trust does not support the Plaintiffs' construction of those instruments.

The Plaintiffs' reasoning seems to be that: (a) Prior to termination, individual Menominees had individual rights in tribal lands that could not be alienated without their individual assent, (b) the purpose of the Menominee Termination Act was to require that the same "rule" be followed subsequent to termination, and (c) the lake development was improper because the rule was not in fact followed.

This reasoning is so riddled with fallacies as to deserve the label spurious.

#### (a) Individual Menominees never had any individual rights in Menominee Lands.

No individual Menominee ever held any individual right in Menominee tribal property prior to termination. Tribal

property was owned by the tribe and the tribe, rather than the individuals, had the exclusive right to make the decisions about its alienation.

The Menominee Termination Act was consistent with tribal law in this respect. It specifically provided that the beneficial interests of the Menominees in their tribal property could be alienated only "in accordance with such regulations as may be adopted by the tribe." 25 USC §893, Pet. App. p. 75.

Prior to termination the Menominees acted through their Advisory and General Councils. Relatively few people, in fact, turned out for Council meetings in part because the Menominees were widely scattered. As the Wisconsin Supreme Court noted (Pet. App. p. 3) only 107 people voted on the question of the adoption of the Termination Plan in 1959 out of 3,270 Menominees.

The situation that existed prior to termination is thus no precedent for the Plaintiffs who request that the approval of two-thirds of all Menominees, wherever located, (or their non-Menominee heirs or successors who have beneficial interests in MEI) is a prerequisite to the sale of land to non-Menominees.

**(b) The Menominee Termination Act gave the Menominees the right to spell out the rules governing sales of land after termination with a Termination Plan.**

The history of the Menominee Termination Act is complex.[4] Suffice it to say here that the Act gave the

[4] Some of the background was covered by the testimony given at the trial. See the appendix to this brief (hereinafter referred to as the "Kenote App.") at pp. App. 1-39. The Wisconsin Supreme Court also reviewed the background of events in general quite extensively. Pet. App. pp. 2-9.

Menominees the right to devise a "Plan" to govern what would be done with their tribal assets after termination and provided that, if the "Plan" were approved by the Secretary of the Interior, the federal government would follow it. Such a plan was adopted, approved, and followed. The documents set forth in this "Plan" rather than historical precedent now obviously govern the method of alienating former tribal lands.

**(c) The Termination Plan vested the ultimate power to approve of land sales in the hands of the Voting Trust Trustees during the life of the Voting Trust.**

The Articles of Incorporation of MEI and the terms of the Menominee Common Stock & Voting Trust both indicate that the ultimate power to approve of land sales to non-Menominees was in the hands of a Voting Trust.

The Articles of Incorporation provided that such land sales had to be approved first by the MEI Directors and then, under Article XII, by "the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon." Because the Voting Trust would hold all of the shares while it was in existence and be entitled to vote those shares, its trustees (and only its trustees) would have the power under Article XII to approve of land sales.

The same power is clear in the terms of the Voting Trust. These terms, of course, were also specifically included in the "Plan" and approved by the Menominees. Suffice it to say here that the Wisconsin Court analyzed those trust terms extensively and accurately (Pet. App. pp. 23-28) and that, since Plaintiffs have not even attempted to find any fault with that analysis, we do not feel it needs to be repeated here.

*It is noteworthy that Plaintiffs' petition for writ of certiorari does not discuss the terms of the trust much less attempt to refute the Wisconsin Supreme Court's analysis of them.* This is undoubtedly because the trust terms refute all of Plaintiffs' contentions.

The Trial Court made several errors in this case. The most basic one was ignoring the trust's terms when attempting to ascertain the power of the trustees under it. This error was noted by the Wisconsin Court (Pet. App. pp. 24-25) and corrected. Plaintiffs' proposed appeal is intended to persuade this Court to repeat that error. Suffice it to say that the request is unjustified.

The Trial Court also erred in his evaluation of the extrinsic evidence. He ignored, first of all, all of the specific evidence in the point he was deciding: All of this pointed to the fact that the Trustees had the right to approve of land sales. That evidence was:

(i) The parties stipulated that this was the interpretation of the Trust given to the Coordinating & Negotiating Committee by tribal attorneys. (Kenote Appendix p. 6).

(ii) Mr. George Kenote, Chairman of the Coordinating & Negotiating Committee, testified that he intended and understood that the Trustees would have this right. (Kenote Appendix p. 21) No one else testified they had any different understanding.

(iii) Both Mr. Kenote (Kenote App. p. 21) and Mr. Gordon Dickie (Kenote App. p. 7), another member of the Coordinating & Negotiating Committee, testified that they had explained that the Trustees would have this right to many members of the Tribe

and to the many state and federal officials. They also testified that they never gave any contrary interpretations and never heard anyone else give any contrary interpretations until this suit. Their testimony was unrefuted.

(iv) The opinion of the Wisconsin Attorney General circulated at a hearing of the state's Menominee Indian Study Committee held in Madison on April of 1959, at which a number of Menominees were present, stated specifically that the Trustees had the right to approve of land sales to non-Menominees. (Ex. 35, R. p. 1141)

(v) At a hearing held by the Menominee Indian Study Committee in Keshena on April 18, 1959, at which 50 or 60 people were present, the Attorney General asked a Menominee who had attended all of the important meetings and was the wife of the tribal interpreter about her understanding on this point. She answered that she believed the individual Menominees were the "shareholders" but also understood specifically that the Trustees would have the right to exercise the rights of shareholders to approve land sales so long as the Trust was in existence. (Ex. 34, R. p. 1091, Kenote App. pp. 25-26)

(vi) The Trustees' right to approve land sales was specifically confirmed to all Menominees in a June 1, 1959 edition of the *Menominee News*. (Ex. 37, R. p. 1175)

(vii) The power to approve land sales was confirmed by "practical construction" of the Trust by the Trustees. (See Stipulation of Fact Nos. 17-21, R. pp. 271-273)

The Trial Court based his contrary decision exclusively on his readings of the minutes of the Menominee Tribal Councils of 1958 and 1959. But he admitted:

> "I found no discussion in any of the minutes as to whether the trustees would have the right to exercise the authority to sell contained in Article XII during the period that the shares were in trust." (Pet. App. p. 52)

The Trial Court then offered his speculation as to what the Menominees intended. He was guided mainly by an idea that the machinery set forth in Article XII of the Articles of Incorporation would not make sense if the vote of the trustees could authorize the land sales because that would make sales too easy:

> "I am most impressed by the deliberate selection of a very difficult and involved machinery to authorize the sale of land." (Pet. App. p. 54)

What the Trial Court failed to consider was the fact this machinery would make sense and would in fact be utilized *after* the trust terminated and that the termination of the trust was within the contemplation of the parties at the time the Plan was adopted. The latter fact was noted by the Wisconsin Supreme Court. (Pet. App. p. 28)

The Trial Court also ignored the distinction the Plan made between the composition of MEI's Board and the Voting Trust Trustees. A majority of the former were to be non-Menominees whereas a majority of the latter were to be Menominees—and this distinction was not lost on the Menominees. The discourse in the Council meetings upon which the Trial Court relied all related to criticisms of too much power in the hands of the Directors. The Trial Court's assumption that all of this discourse applied equally and automatically to the trustees was unwarranted.

The Wisconsin Supreme Court, of course, did not discuss the "purpose" of the documents as determined from the extrinsic evidence because it found the documents to be unambiguous. The extrinsic evidence is mentioned here simply to show that the assumption underlying the Plaintiffs' claimed reliance on the "rule of liberal construction", i.e. that the "purpose" of those documents as they see it was clearly shown by the extrinsic evidence, is not supported by the record.

**B. The Menominee Termination Act Was Not Violated.**

The entire section of the Plaintiffs' brief devoted specifically to showing a violation of the Menominee Termination Act is comprised of an argument that technical error was committed in the manner in which the "Certificate of Beneficial Interest" required by 25 USC §893 was written up and then cancelled since the acts of the tribal leaders were not specifically governed by the Plan.

This argument is dealt with correctly by the Wisconsin Supreme Court's Opinion. (Pet. App. p. 22) The principal flaw in it is that the Certificate of Beneficial Interest was required by the statute before the Plan was adopted. Its existence thus hardly supports any argument that the statute was violated. The Certificate was a part of the statutory procedure used to identify the Menominee people in the "final roll" not the disposition of Tribal Assets under the "Plan." The transfers of property were all consistent with the Plan.

It is interesting to note that this argument, if accepted, would void the title of MEI to all lands received by it after termination, not just the title of the lands in suit. Yet Plaintiffs have never attached MEI's title to any lands. Plaintiffs' argument is thus not only totally without merit but inconsistent with their basic posture in the case.

The Wisconsin Court was, we believe, generous to the Plaintiffs in even considering this argument since it was not raised in the pleadings, argued before the Trial Court, or discussed in the Trial Court's opinions. It was an afterthought below—and certainly raises no serious federal issue here.

## III. CONCLUSION

We have, we believe, showed that the "federal questions" the Plaintiffs say are present in this case are nonexistent. In closing, we would like to point out that the issues that were raised below were properly decided by reference solely to state law.

The Plaintiffs' principal contention always has been that the unanimous vote of the Voting Trustees in favor of land sales is insufficient because the trust was invalid for want of compliance with *Wis. Stats.* sec. 180.27.[5] That statute requires the signatures of shareholders on Voting Trust instruments. The Plaintiffs complained because all of the individual Menominees did not sign the Voting Trust instrument.

The Wisconsin Supreme Court disposed of this argument by pointing out that, prior to termination, the individual Menominees were not "shareholders" within the meaning of this Wisconsin statute, a question solely one of Wisconsin law.

The additional argument that the Articles and trust should be "interpreted" to support the Plaintiffs' position was also disposed of by the Wisconsin Supreme Court

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[5] It is hard indeed to read any other allegations into the original complaint. Its two counts both seemed dependent on the invalidity of the trust. See the summation of the pleadings by the Wisconsin Supreme Court. (Pet. App. pp. 9, 10)

based on general authorities dealing with state law and earlier Wisconsin cases dealing with the interpretation of trust instruments. (Appendix 23, 25 and 26) Guidance from federal law was neither required nor sought on this point below.

We respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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